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Direct Democracy in the German Länder: History, Institutions, and (Mal)Functions

Andreas ROHNEF

Rohner, Andreas

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Abstract

This paper examines the direct democratic institutions within the German political system. In a first step, direct democratic elements are analyzed in a historical context covering a period from the Weimar Republic to and beyond German Reunification. In a second step, the direct democratic instruments provided in the Basic Law and the various state constitutions are analyzed in their respective legal context whereby the focus lies on the Länder level. Finally, the main points of criticism of the current state of direct democracy in Germany – and their remedies – are to be outlined.

The historical analysis shows that the "Weimar experience" – contrary to commonly held beliefs – cannot provide the reason for not implementing direct democratic elements in the Basic Law after World War II. The comparative legal examination of the Länder constitutions identifies three institutional types of direct democracy – a two-tier-model, a three-tier-model and a hybrid model – which are presented in detail. The criticism of the current state of direct democracy in Germany concerns formal, material, and procedural requirements and restrictions that have to be met in order to make a referendum succeed. The signature quorums are comparatively high and therefore are in danger to exert a prohibitive effect. Moreover, the approval and participation quorums required by some constitutions might undermine one key contribution of direct democracy – the political discussion. The requirement of a reasoned and detailed draft bill – if interpreted too narrowly – may ask too much of laymen. The more or less comprehensive preclusion of budget-affecting issues virtually excludes any referendums. The parliament's right to submit a counter-proposal might be misused as a means of splitting of votes – in particular where the voter is allowed to cast only a single yes-vote.

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List of Abbreviations

| | |
|-----------------|--|
| approx. | approximately |
| Art. | Article |
| BB | Brandenburg |
| BBLV | State Constitution of Brandenburg (<i>Verfassung des Landes Brandenburg vom 20. August 1992</i>) |
| BBVAG | Brandenburg Law on Referendum (<i>Gesetz über das Verfahren bei Volksinitiative, Volksbegehren und Volksentscheid "Volksabstimmungsgesetz" vom 14. April 1993</i>) |
| BE | Berlin |
| BEAbstG | Berlin Law on Referendum (<i>Gesetz über Volksinitiative, Volksbegehren und Volksentscheid "Abstimmungsgesetz" vom 11. Juni 1997</i>) |
| BELV | State Constitution of Berlin (<i>Verfassung von Berlin vom 23. November 1995</i>) |
| BV | Federal Constitution of the Swiss Confederation (<i>Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999</i>) |
| BVerfGH | Federal Constitutional Court (<i>Bundesverfassungsgericht</i>) |
| BW | Baden-Württemberg (<i>Baden-Württemberg</i>) |
| BWL | State Constitution of Baden-Württemberg (<i>Verfassung des Landes Baden-Württemberg vom 11. November 1953</i>) |
| BWVAbstG | Baden-Württemberg Law on Referendum (<i>Gesetz über Volksabstimmung und Volksbegehren "Volksabstimmungsgesetz" vom 23. Februar 1984</i>) |
| BY | Bavaria (<i>Freistaat Bayern</i>) |

| | |
|-----------------|--|
| BYLV | State Constitution of Bavaria (<i>Bayerische Verfassung vom 2. Dezember 1946</i>) |
| BYLWG | Bavaria Election Law (<i>Gesetz über Landtagswahl, Volksbegehren und Volksentscheid "Landeswahlgesetz" vom 5. Juli 2002</i>) |
| BYVerfGH | State Constitutional Court of Bavaria (<i>Bayerischer Verfassungsgerichtshof</i>) |
| CDU | Christian Democratic Union of Germany (<i>Christlich Demokratische Union Deutschlands</i>) |
| cf. | <i>confer</i> |
| CSU | Christian Social Union of Bavaria (<i>Christlich-Soziale Union in Bayern</i>) |
| ed. | editor |
| e.g. | <i>exempli gratia</i> |
| et al. | <i>et alii</i> |
| etc. | <i>et cetera</i> |
| e.V. | registered association (<i>eingetragener Verein</i>) |
| FDP | Free Democratic Party (<i>Freie Demokratische Partei</i>) |
| f. | <i>folio</i> |
| GDR | German Democratic Republic |
| GG | Basic Law (<i>Grundgesetz für die Bundesrepublik Deutschland vom 23. Mai 1949</i>) |
| HB | Bremen (<i>Freie Hansestadt Bremen</i>) |
| HBLV | State Constitution of Bremen (<i>Landesverfassung der freien Hansestadt Bremen vom 21. Oktober 1947</i>) |
| HBGVV | Bremen Law on Referendum (<i>Gesetz über das Verfahren beim Volksentscheid vom 27. Februar 1996</i>) |

| | |
|-----------------|---|
| HBStGH | State Constitutional Court of Bremen (<i>Staatgerichtshof der freien Hansestadt Bremen</i>) |
| HE | Hesse (<i>Hessen</i>) |
| HELV | State Constitution of Hesse (<i>Verfassung des Landes Hessen vom 1. Dezember 1946</i>) |
| HEVoBegG | Hesse Law on Referendum (<i>Gesetz über Volksbegehren und Volksentscheid vom 16. Mai 1950</i>) |
| HH | Hamburg (<i>Freie und Hansestadt Hamburg</i>) |
| HHLV | State Constitution of Hamburg (<i>Verfassung der Freien und Hansestadt Hamburg vom 6. Juni 1952</i>) |
| HHVAbstG | Hamburg Law on Referendum (<i>Hamburgisches Gesetz über Volksinitiative, Volksbegehren und Volksentscheid "Volksabstimmungsgesetz" vom 20. Juni 1961</i>) |
| i. e. | <i>id est</i> |
| MV | Mecklenburg-West Pomerania (<i>Mecklenburg-Vorpommern</i>) |
| MVLV | State Constitution of Mecklenburg-West Pomerania (<i>Verfassung des Landes Mecklenburg-Vorpommern vom 23. Mai 1993</i>) |
| MVVAG | Mecklenburg-West Pomerania Law on Referendum (<i>Gesetz zur Ausführung von Initiativen aus dem Volk, Volksbegehren und Volksentscheid in Mecklenburg-Vorpommern "Volksabstimmungsgesetz" vom 31. Januar 1994</i>) |
| NS | Lower Saxony (<i>Niedersachsen</i>) |
| NSDAP | National Socialist German Workers' Party (<i>Nationalsozialistische Deutsche Arbeiterpartei</i>) |
| NSLV | State Constitution of Lower Saxony (<i>Niedersächsische Verfassung vom 19. Mai 1993</i>) |

| | |
|------------------|--|
| NSVAbstG | Lower Saxony Law on Referendum (<i>Niedersächsisches Gesetz über Volksinitiative, Volksbegehren und Volksentscheid "Niedersächsisches Volksabstimmungsgesetz" vom 23. Juni 1994</i>) |
| NW | North Rhine-Westphalia (<i>Nordrhein-Westfalen</i>) |
| NWL | State Constitution of North Rhine-Westphalia (<i>Verfassung für das Land Nordrhein-Westfalen vom 28. Juni 1950</i>) |
| NWVIVBVEG | North Rhine-Westphalia Law on Referendum (<i>Gesetz über das Verfahren bei Volksinitiative, Volksbegehren und Volksentscheid vom 1. Oktober 2004</i>) |
| PDS | Party of Democratic Socialism (<i>Partei des Demokratischen Sozialismus</i>) |
| RP | Rhineland-Palatinate (<i>Rheinland-Pfalz</i>) |
| RPLV | State Constitution of Rhineland-Palatinate (<i>Verfassung für Rheinland-Pfalz vom 18. Mai 1947</i>) |
| RPLWahlG | Rhineland-Palatinate election law (<i>Landeswahlgesetz vom 24. November 2004</i>) |
| SED | Socialistic Unity Party of Germany (<i>Sozialistische Einheitspartei Deutschlands</i>) |
| SH | Schleswig-Holstein |
| SHLV | State Constitution of Schleswig-Holstein (<i>Verfassung des Landes Schleswig-Holstein vom 13. Mai 2008</i>) |
| SHVAbstG | Schleswig-Holstein Law on Referendum (<i>Gesetz über Initiativen aus dem Volk, Volksbegehren und Volksentscheid "Volksabstimmungsgesetz" vom 5. April 2004</i>) |
| SL | Saarland |
| SLLV | State Constitution of Saarland (<i>Verfassung des Saarlandes vom 15. Dezember 1947</i>) |

| | |
|-----------------|--|
| SLVAbstG | Saarland Law on Referendum (<i>Volksabstimmungsgesetz vom 16. Juni 1982</i>) |
| SLVerfGH | State Constitutional Court of Saarland (<i>Verfassungsgerichtshof des Saarlandes</i>) |
| SN | Saxony (<i>Freistaat Sachsen</i>) |
| SNLV | State Constitution of Saxony (<i>Verfassung des Freistaates Sachsen vom 27. Mai 1992</i>) |
| SNVerfGH | State Constitutional Court of Saxony (<i>Verfassungsgerichtshof des Freistaates Sachsen</i>) |
| SNVVVG | Saxony Law on Referendum (<i>Gesetz über Volksantrag, Volksbegehren und Volksentscheid vom 19. Oktober 1993</i>) |
| SPD | Social Democratic Party of Germany (<i>Sozialdemokratische Partei Deutschlands</i>) |
| ST | Saxony-Anhalt (<i>Sachsen-Anhalt</i>) |
| STLV | State Constitution of Saxony-Anhalt (<i>Verfassung des Landes Sachsen-Anhalt vom 16. Juli 1992</i>) |
| STVAbstG | Saxony-Anhalt Law on Referendum (<i>Gesetz über das Verfahren bei Volksinitiative, Volksbegehren und Volksentscheid "Volksabstimmungsgesetz" vom 26. Oktober 2005</i>) |
| TH | Thuringia (<i>Freistaat Thüringen</i>) |
| THBVVG | Thuringia Law on Referendum (<i>Thüringer Gesetz über das Verfahren bei Bürgerantrag, Volksbegehren und Volksentscheid vom 23. Februar 2004</i>) |
| THLV | State Constitution of Thuringia (<i>Verfassung des Freistaats Thüringen vom 25. Oktober 1993</i>) |
| U. S. | United States |

VAbstG Law on Plebiscites (*Gesetz über Volksabstimmung vom 14. Juli 1933*)

WRV Weimar Constitution (*Verfassung des Deutschen Reichs "Weimarer Reichsverfassung" vom 11. August 1919*)

I. Introduction

After the peaceful revolution that finally led to the collapse of the German Democratic Republic (GDR) and to the German Reunification, a revision of thinking took place: Whereas direct participation of the people was strongly stigmatized after World War II, the success of the citizens' movement led to a boost of direct democracy: at first in the "new Bundesländer" only, later in western Germany as well. These days, direct democratic institutions are an inherent part of German politics in the Länder and on the municipal level. This is in sharp contrast to the federal level: The Basic Law (*Grundgesetz für die Bundesrepublik Deutschland vom 23. Mai 1949*) does not provide any direct democratic institutions – exceptions are discussed in section 4 – even though a large section of the population would appreciate a stronger influence on national politics.¹

It is the aim of this paper to present an overview of the political and legal debates on this controversial issue and of the (mal)functions of direct democratic institutions in the Länder. Therefore, an overview of direct democratic institutions in German history is presented in the next part and is followed by a description of the implementation of direct democratic elements on the federal, Länder- and municipal level. Subsequently, Part IV sums up the criticism on the current state of direct democracy, while part V finally contains some concluding remarks.

II. Historical Context

There are two reasons to shed some light on the historical context of direct democratic elements: (1) The applicable provisions of direct democratic institutions in the constitutions of the German Länder can be traced back to the respective regulations in the Weimar Constitution; (2) The "Weimar experience" was – and to a lesser extent still is – a recurring argument against direct democracy in Germany. This section is structured as follows: In a first step, direct democratic institutions, their application, and their influence dur-

¹ A recent poll showed that 76 percent of the respondents would appreciate a popular referendum on the federal level (see <http://www.infratest-dimap.de/umfragen-analysen/bundesweit/umfragen/aktuell/grosse-mehrheit-fuer-mehr-volksentscheide-knappe-mehrheit-erwartet-dass-schwarz-gelb-durchhaelt/> [accessed March 2, 2011]).

ing Weimar Republic and World War II are presented. In a second step, the question why the Basic Law does not offer more opportunities for a direct involvement of the people should be answered by ruling out the deliberations of the framers of the Basic Law during the drafting process and the political parties' stance on direct democratic elements in general. This historical overview is to be complemented with a brief discussion of the most recent trends in direct democracy since reunification.

1. Direct Democratic Elements during the Weimar Republic and the Third Reich

After the tumultuous period of the German Revolution in November 1918 which finally led to the proclamation of the republic and the Kaiser's enforced abdication, general election were held on January 19, 1919, to create a national assembly, which was entrusted with framing a new constitution. The Constitution of the German Reich – commonly known as the Weimar Constitution (WRV) – became effective on August 11, 1919, and was the first democratic constitution on German soil; the highly controversial Art. 73–76 WRV even provided direct participation of the people during the legislative process – mainly integrated as an element of checks and balances between the executive and the legislative branches of government, but also within the legislative body itself between the Reichstag (house of people's representatives) and the Reichsrat (house of Länder):

- Art. 73 (1) WRV stated that a law passed by the Reichstag had to be presented in a referendum if the Reichspräsident (head of state) decided so, within the period of a month.
- Art. 73 (2) WRV required a law whose proclamation had been suspended by a minimum of one third of the members of the Reichstag had to be presented in a referendum if one twentieth of the enfranchised voters demanded so.
- Art. 73 (3) WRV stipulated that a referendum had to be held if one tenth of the enfranchised voters demanded a draft law to be presented.
- The Reichsrat was entitled to object to laws passed by the Reichstag. If this objection could not be resolved, the Reichspräsident at his discretion could call for a referendum or let the draft law die. If the Reichstag

voted to overrule the Reichsrat's objection by a two-thirds majority, the Reichspräsident was obligated to either bring the law into force or to call for a referendum (Art. 74 (3) WRV).

- If the Reichstag decided on a constitutional amendment against the Reichsrat's objection, the Reichspräsident might not proclaim the amendment if the Reichsrat, within a period of two weeks, demanded a plebiscite to be held (Art. 76 (3) WRV).

Additionally, a referendum also had to be held for the transfer of state territory or the formation of new states within the Reich. In any of the aforementioned cases, the referendums provided for in the Weimar Constitution were only facultative ones. As important as these opportunities offered in Art. 73–76 WRV were the restrictions they imposed: Pursuant to Art. 75 WRV, a referendum was successful only if the majority of enfranchised voters participated (participation quorum), constitutional amendments had to be approved by a majority of those entitled to vote (approval quorum); Art. 73 (4) WRV precluded any people-initiated referendums concerning budget, taxation laws or pay regulations (financial taboo).

In view of the political and social tensions during the Weimar Republic, the number of referendums in the Reich was surprisingly low. Not a single plea for referendum was initiated by either the Reichspräsident, the Reichstag or the Reichsrat – which reflects the general impression that the state organs perceived the direct democratic legislation as a “procedure of second quality” (Schiffers 2002: 67).² The people itself was slightly more active and filed a petition for a referendum in eight cases out of which three were not admitted because of the financial taboo, one was accepted unaltered by the Reichstag (therefore, there was no need for a referendum), one was no longer pursued by its initiators, one failed to overcome the 10 %-signature threshold, therefore only two petitions actually led to a referendum. Neither of them had been successful, since neither the referendum for the expropriation of royal houses (*Fürstenenteignung*) in 1926 nor the referendum against the Young-Plan in 1929 passed the threshold of the majority of enfranchised voters to participate. However, in both cases more than 90 % of the participating voters opted in favor of the relevant law.

² The reluctance of the political parties was further demonstrated by the fact that the corresponding implementing statute had not been enacted until June 27, 1921.

On July 14, 1933, Hitler – having seized power in 1933 – enacted the Law on Plebiscites (*Gesetz über Volksabstimmungen*) whose succinct provisions changed the aspect of direct democracy in a fundamental way. Whereas the direct democratic institutions in the Weimar Constitution had an oppositional or an arbitrable function, they became instruments of the government, since the Law on Plebiscites put the decision on date and question of a referendum at the government's own discretion.³ Therefore, the referendums were in danger to be used to pass a law by acclamation. Far more influential than the Law on Plebiscites, however, was the change in the political environment under the Nazi dictatorship: The monopolization of the formation of political will under the NSDAP, the stigmatization and the harassment dissenters were subjected to, the clear violation of democratic principles by not granting the secrecy of the ballot, suggestive questioning etc. – all this thwarted freedom of expression (Jung 1995: 28ff.). Bugiel (1991: 248) further questions the legality of the three cases of plebiscitary referendums under the Nazi regime: Contrary to § 1 VAbstG which stated the admissibility of plebiscites on *intended* measures, the plebiscites on the withdrawal from the League of Nations (*Austritt aus dem Völkerbund*, 1933), head of state (*Staatssoberhaupt*, 1934), and the annexation of Austria (*Anschluss Österreichs*, 1938), were held *after* the respective decisions were made.

In accordance with prevailing doctrine one has to conclude that the “Weimar experience” is limited to the unsatisfactory procedure the Weimar Constitution provided. The participation quorum – and the approval quorum for constitutional amendments – favors the opponents of an initiative since it provides strong incentives to abstain from voting which is cheap – cheaper than the mobilization of supporters to vote against a bill – and it offers the possibility to misstate all non-voters as opponents (Schiffers 2002: 72). However, one has to re-emphasize that the use during Weimar Republic and the Third Reich cannot discredit the elements of direct democracy. Following Pestalozza (1981: 29), one could hold that if the misuse of the Reichstag's election could not inhibit the framers of the constitution to improve the electoral regime, the misuse of referendums during Weimar Republic and Third

3 On the other hand, § 2 VAbstG required only the majority of the votes therefore dropping the participation quorum required in Art. 75 WRV. In this respect, the new provision led to an easing of restrictions.

Reich cannot be the reason to preclude any direct democratic elements on a federal level.

2. Direct Democratic Elements in Post-War Germany

Contrary to commonly held beliefs, it was not the aforementioned “Weimar experience” which inhibited the framers of the constitution from including direct democratic elements within the Basic Law. As more recent research shows (see Jung 1994; Wiegand 2006: 166ff.; Bachmann 2009), the framers were more heavily influenced by the Cold War: In May, 1948, the SED, the Socialistic Unity Party of Germany (Sozialistische Einheitspartei Deutschlands), started a petition for a referendum “for the German Unity” as part of its national-patriotic agitation strategy aiming at the German unification under the Soviet model (Braun 1993). Despite its questionable lawfulness and the missing admission by the military governments of the Western Zones, the initiators succeeded to collect some three million signatures (approx. 7 % of those entitled to vote) in the Western Zones. The unexpected success of these politically undesired forces resulted in a “quarantine-concept”, as Jung (1994: 329) puts it, i. e. the renouncement – at least until the political system of (West-)Germany has been consolidated – on any direct democratic elements on the federal level. In the Länder, however, direct democratic elements were enshrined in all constitutions that came into force in 1946/1947.⁴ The constitutions that came into force after 1949 were more reluctant either because of the influence of the Basic Law or because of specific political circumstances.⁵

In the following decades, there were no serious attempts to enshrine direct democratic elements in the Basic Law (Bachmann 2009: 110), and in 1976, the “Enquete Commission” set up by the German Bundestag found that the inclusion of referendums and other direct democratic institutions was not to be recommended, since these direct democratic elements could undermine the functioning and legitimation of representative institutions (Bugiel 1991: 57ff.; Wiegand 2006: 251ff.).

⁴ For a detailed list of direct democratic elements in the state constitutions after World War II, see Wiegand 2006: 181ff..

⁵ See Wiegand 2006: 181.

In the late 1980s, decreasing turnout rates raised awareness of the disenchantment with politics of large proportions of the population; furthermore, low turnout in elections raised doubts about the procedural legitimacy of representative democracy (Weixner 2002: 35ff.). These developments sparked new interest in direct democracy since it was deemed a possible solution to these problems (Fijalkowski 1986; Weixner 2002: 35ff.; Neumann 2009: 76ff.). Direct democracy was further buoyed by the German Reunification: The peaceful collapse of the GDR, influenced most importantly by citizens' movements, showed the democratic maturity of the German people (Rux 2008: 63ff.).⁶ Meanwhile, the revision of the Schleswig-Holstein Constitution in the wake of the "Barschel-Affair"⁷ strengthened controls on the executive branch of government by introducing more permissive provisions of direct democracy (Kellmann 2005: 285ff.).

3. Developments of Direct Democracy Since Reunification

The issue of direct democracy on the federal level was once again heavily disputed in course of the discussion of the Joint Constitutional Commission (Gemeinsame Verfassungskommission). Parties of the political left (SPD, Bündnis 90/Die Grünen; PDS/Linke) submitted various proposals; however, all plans to adopt more permissive provisions of direct democracy in the Basic Law failed because they could not secure the required two-thirds majority, mainly due to the reluctance of the parties of the political right (CDU/CSU, FDP) (Wiegand 2006: 271ff.).

Yet, the stagnation on the federal level was in sharp contrast with the development on the Länder level. Under the influence of the revised Constitution of Schleswig-Holstein providing a broader scope of direct democratic institutions and with reference to the positive influence of the citizens' movements on the peaceful collapse of the GDR, the "new Bundesländer" (Brandenburg, Mecklenburg-West Pomerania, Saxony, Saxony-Anhalt, and Thuringia) all

⁶ On the impact of German Reunification on direct democracy, see Klages and Paulus 1996.

⁷ The Barschel-Affair was one of the biggest political scandals in German post-war history. A Spiegel-magazine report revealed that Mr. Barschel, then-incumbent prime minister of Schleswig-Holstein, had ordered his media advisor to spy on the sex life of Mr. Engholm, his rival in the upcoming state elections.

adopted comparatively permissive and innovative provisions of direct democratic instruments (Wiegand 2006: 266ff.).⁸

On the federal level, a further attempt was made in 2002, when the incumbent coalition of SPD and Bündnis 90/Die Grünen introduced another plan to implement direct democratic elements on the federal level. This proposal – whose rather restrictive provisions were criticized by relevant special interest groups (e. g. “Mehr Demokratie e. V.”) – was supported by a majority of mainly leftist members of the Bundestag, however, it failed to overcome the two-thirds majority threshold (Wiegand 2009: 451ff.).

III. Legal Context

4. Direct Democratic Elements in the Basic Law

The Basic Law stipulates in its Art. 20 (2) that the people shall exercise the state authority which is entirely vested in it not only by elections but also by “other votes”.⁹ However, only one specific provision of the Basic Law envisages the latter way of exercising state authority: For revisions of the existing division into Länder, Art. 29 GG requires a federal law, which must be confirmed by referendum. In addition, Art. 146 GG states that “[t]his Basic Law [...] shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.” But this highly contested provision might not be considered as an element of direct democracy *within* the Basic Law (Böckenförde 2006: 114).

Although there is some agreement that the Basic Law is open for other means of direct democracy, there is no consensus whether their introduction

8 With the exception of Thuringia, all new Bundesländer opted for a three-tier or a hybrid model of people’s legislation (cf. section 5.1 on the following page), the signature quorums required for a popular initiative were – and still are – comparatively low, Brandenburg’s Art. 76 (3) BBLV even provides the participation of all its residents (including foreigners) in popular initiatives. However, regarding the signature quorums required in the petition phase and the approval quorums required in the referendum phase, the new Bundesländer converged on the West German standard.

9 Art. 20 (2) GG reads: “All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies”. Regarding the coordinate conjunction connecting “elections” and “other votes”, it should be clear that the only inference one can draw is the normative equality of representative and direct democracy (Wittreck 2009). Nonetheless, there is widespread misconception of the *practical* predominance of parliamentary legislation as a constitutional decision for its primacy.

requires an amendment of the Basic Law or whether an ordinary law would be sufficient.¹⁰ According to Bugiel (1991: 443), one side argues that Art. 20 (2) GG has to be read as an authorization of the legislative body to do so whereas the other side implies an exhaustive regulation of the Basic Law through the existence of Art. 29 GG as a specific case. This latter view is convincingly contradicted by Böckenförde (2006: 115) who argues that it is unnecessary to mention “other votes” in Art. 20 (2) GG if the introduction of additional elements of direct democracy would require a constitutional amendment anyway. Bugiel (1991: 119) further shows that Art. 29 GG is *not* a specific case of Art. 20 (2) GG, since they do not refer to the same addressee. Whereas Art. 20 (2) GG refers to the collectivity of citizens on the federal level, Art. 29 GG instead focuses on the citizens of the affected Länder only.

5. Direct Democratic Elements in the Constitutions of the Länder

By now, all Länder provide for direct participation of the people in one way or the other. As outlined above, Art. 20 (2) GG explicitly mentions “other votes” as one means to exercise state authority; therefore, those elements of direct democracy are in line with the general principles set forth in the Basic Law, as required by Art. 28 (1) GG.¹¹ In this section the various direct democratic institutions, their procedures, and their importance for legislation are to be presented.

5.1. People’s Legislation

Although all constitutions of the Länder offer the people to get involved in the process of legislation, there is no uniformity in procedure: Some Länder offer a two-tier approach only¹², in others – particularly in most of the newly

¹⁰ For a detailed summary of these debates, see Bugiel 1991: 443ff..

¹¹ Art. 28 (1) GG reads: “The constitutional order in the Länder must conform to the principles of a republican, democratic and social state governed by the rule of law, within the meaning of this Basic Law. [...]”.

¹² Baden-Württemberg (Art. 59, 60, and 64 BWLV; BWVAbstG), Bavaria (Art. 71–75 BYLV; Art. 63–88 BYLWG), Berlin (Art. 59, 62, 63, and 100 BELV; BEAbstG), Bremen (Art. 70, 71, and 125 HBLV; HBGVV), Hesse (Art. 123 and 124 HELV; HEVoBegG), Lower Saxony (Art. 48

formed states of the former GDR – a three-tier approach is mandatory¹³, and a third group of Länder permits both ways¹⁴.

5.1.1. Two-Tier-Model

The two-tier-model subdivides into the Volksbegehren (hereafter referred to as “petition for a referendum”) and the Volksentscheid (hereafter “referendum”). However, the petition for a referendum is preceded by a formal and material examination of admissibility. Therefore, in a first step, the required number of signatures for the application of admission for a referendum (Zulassungsantrag auf Volksbegehren) has to be collected, whereby this number ranges from only 3 000 signatures which is equivalent to approx. 0.2 % of those entitled to vote in North Rhine-Westphalia to 3 % of those eligible to vote in Hesse. Thereafter, the competent authority (Ministry of the Interior, the Government of the State or the State Parliament) – in the last instance the respective (state) constitutional court – has to decide on the admissibility of the application.¹⁵ After admission, a certain number of signatures has to be collected within a prescribed period of time to make the petition for a referendum succeed. Here, too, the signature quorums differ: 7 % of those entitled to vote within 4 months are required in Berlin, whereas 20 % of those eligible within just 14 days are required in Hesse and Saarland. It is only after the aforementioned requirements are met that the parliament debates on the draft bill. The parliament has three possibilities: Either it completely endorses the draft bill, rendering the referendum obsolete, or it completely rejects the draft bill, which leads to a referendum; moreover, the parliament may reject the draft bill by submitting a counter-proposal, which is to be voted on simultaneously.¹⁶

Table 1 summarizes the required signature quorums and time limits of the first two phases and the approval quorums for the third phase of a referendum.

and 49 NSLV; NSVAbstG), North Rhine-Westphalia (Art. 68 and 69 NWLV; NWVIVBVEG), Saarland (Art. 99 and 100 SLLV; SLVAbstG), Thuringia (Art. 81–83 THLV; THBVVG).

13 Brandenburg (Art. 22 and 75–81 BBLV; BBVAG), Hamburg (Art. 50 HHLV; HHVAbstG), Saxony (Art. 70–74 SNLV; SNVVVG), Schleswig-Holstein (Art. 41 and 42 SHLV; SHVAbstG).

14 Mecklenburg-West Pomerania (Art. 59 and 60 MVLV; MVVAG), Rhineland-Palatinate (Art. 107–109 RPLV; § 60d–84 RPLWahlG), Saxony-Anhalt (Art. 80 and 81 STLV; STVAbstG).

15 The criteria of admissibility are analyzed in sections 7, 8, and 9.

16 For the potential misuse of counter-proposals as a means of splitting of votes, cf. section 10.

Table 1: Formal Requirements for Sub-Constitutional Referendums in Two-Tier-Models

| Land | admission phase | | petition phase | | referendum phase | |
|------|---------------------|----------|-------------------|--------------------------|------------------|--------------|
| | signatures | period | signatures | period | appr. quorum | part. quorum |
| BW | 10 000 (0.10 %) | none | 16.7 % | 14 days | 33.3 % | none |
| BY | 25 000 (0.30 %) | 2 years | 10 % | 14 days | none | none |
| BE | 20 000 (0.70 %) | none | 7 % | 4 months | 25 % | none |
| HB | 5 000 (1.00 %) | none | 10 % | 3 months | 25 % | none |
| HE | (128 000) 3.00 % | none | 20 % | 14 days | none | none |
| NS | 25 000 (0.43 %) | 6 months | 10 % | 6–12 months ^a | 25 % | none |
| NW | 3 000 (0.02 %) | none | 8 % | 8 weeks | 15 % | none |
| SL | 5 000 (0.60 %) | 6 months | 20 % | 14 days | 50 % | none |
| TH | 5 000 (0.24 %) | 6 weeks | 10 % ^b | 4 months | 25 % | none |

a 6 months plus maximal 6 months, since the signatures of the application for admission are added.

b 8 % within 2 months if signatures are collected in office.

5.1.2. Three-Tier-Model

The three-tier-model differs from the aforementioned model particularly with respect to the time of parliamentary debate. Whereas in the two-tier-model the examination of admissibility and the parliamentary debate are separated, they are combined in the three-tier-model. Thus, after the required number of signatures for a Volksinitiative – Volksantrag in Saxony – (hereafter referred to as “popular initiative”) is collected, the parliament having decided on the formal and material admissibility of the draft bill is obligated to debate on the concern raised in the popular initiative whereby the initiators are granted the right to attend and speak. As in the two-tier-model, the parliament has the possibility to endorse or to reject the draft bill completely or to submit a counter-proposal accompanying the draft bill. If the parliament opts for one of the two latter variants, it is upon the initiators to start the petition for a referendum. The quorums required for a petition for a referendum range from 80 000 signatures (approx. 4 %) within a four-month-period in Brandenburg to 450 000 signatures or 15 % of those entitled to vote within eight months in Saxony.

The respective quorums and time limits of each phase are summarized in table 2.

Table 2: Formal Requirements for Sub-Constitutional Referendums in Three-Tier-Models

| Land | initiative phase | | petition phase | | referendum phase | |
|------|--|--------|--------------------------------|----------|------------------|--------------|
| | signatures | period | signatures | period | appr. quorum | part. quorum |
| BB | 20 000 ^a (0.77 %) ^b | 1 year | 80 000 (4 %) | 4 months | 25 % | none |
| HH | 10 000 (0.82 %) | none | 5 % | 21 days | 20 % | none |
| SH | 20 000 (0.93 %) | 1 year | 5 % | 6 months | 25 % | none |
| SN | 40 000 (1.11 %) | none | 450 000 ^c (12 %) | 8 months | none | none |

a Inhabitants.

b As percentage of inhabitants.

c Art. 72 (2) SNLV requires a minimum of 450 000 signatures yet no more than 15 % of those entitled to vote.

5.1.3. Hybrid Models

Mecklenburg-West Pomerania, Rhineland-Palatinate, and Saxony-Anhalt provide for a “hybrid model” of people’s legislation. In principle, the people’s legislation follows the two-tier-model (cf. section 5.1.1 on page 9) but as a facultative step the procedure considers the popular initiative as a preliminary stage to the petition for a referendum (Franke-Polz 2005).

In Rhineland-Palatinate and Saxony-Anhalt the initiators follow the scheme of the two-tier-model if they choose not to go for the popular initiative, i. e. they file an application of admission for a referendum (requiring 20 000 signatures in Rhineland-Palatinate and 8 000 signatures in Saxony-Anhalt), subsequently they must collect a certain number of signatures for a petition for a referendum in due time (300 000 signatures within two months in Rhineland-Palatinate, 11 % of entitled voters within six months in Saxony-Anhalt). In Mecklenburg-West Pomerania the examination of admissibility is conducted after the petition for a referendum is filed, i. e. the step of application of admission for a referendum is omitted. The number of signatures required is 120 000 (approx. 8.5 %); there is no time limit.

Table 3: Formal Requirements for Sub-Constitutional Referendums in Hybrid Models (Two-Tier-Variant)

| Land | admission phase | | petition phase | | referendum phase | |
|-----------------|--------------------|--------|--------------------|----------|-------------------|--------------|
| | signatures | period | signatures | period | appr. quorum | part. quorum |
| MV ^a | – | – | 120 000 (8.5 %) | none | 33.3 % | none |
| RP | 20 000 (0.66 %) | 1 year | 300 000 (10 %) | 2 months | none | 25 % |
| ST | 8 000 (0.46 %) | none | 11 % | 6 months | 25 % ^b | none |

a Following the two-tier-variant, the step of application of admission for a referendum is omitted.

b None if the Parliament submits a counter-proposal.

If the initiators choose to file a popular initiative, they have to collect 15 000 signatures (approx. 1.06 % of entitled voters) in Mecklenburg-West Pomerania and 30 000 in Rhineland-Palatinate (approx. 0.99 %) and in Saxony-Anhalt (approx. 1.73 %). A popular initiative providing a drafted bill follows the procedure of the three-tier-model, i. e. in case it is not fully endorsed by the parliament, there is no need to file an application of admission; however, the required signatures for a petition for a referendum still must be collected in due time (signature quorums and time limits see table 4). However, one

may also start a popular initiative that does not provide a drafted bill, for which reason certain thematic restrictions do not apply. Since this latter variant does not lead to a referendum, it is actually less an initiative in the terminology used but rather a popular petition (see below section 5.3.1).

Table 4: Formal Requirements for Sub-Constitutional Referendums in Hybrid Models (Three-Tier-Variant)

| Land | initiative phase | | petition phase | | referendum phase | |
|------|--------------------|--------|--------------------|-------------------|-------------------|--------------|
| | signatures | period | signatures | period | appr. quorum | part. quorum |
| MV | 15 000 (1.06 %) | none | 120 000 (8.5 %) | none ^a | 33.3 % | none |
| RP | 30 000 (0.99 %) | 1 year | 300 000 (10 %) | 2 months | none | 25 % |
| ST | 30 000 (1.73 %) | none | 11 % | 6 months | 25 % ^b | none |

a Upon request the signatures may be collected in office within a 2 months period.

b None if the Parliament submits a counter-proposal.

5.1.4. Approval and Participation Quorums and Further Restrictions

With the exception of Bavaria, Hesse, and Saxony – and Saxony-Anhalt if the parliament submits a counter-proposal –, all state constitutions provide – in keeping with Art. 75 WRV – certain quorums that have to be met in order to make a referendum succeed. Most constitutions require a 15–25 % approval quorum¹⁷; Mecklenburg-West Pomerania's and Baden-Wuerttemberg's Constitution require a 33.3 %-approval quorum (Art. 60 (4) MVLV; Art. 60 (5) BWLV); in Saarland, even a 50 %-approval quorum is required (Art. 100 (3) SLLV); Rhineland-Palatinate is the only state to demand a 25 %-participation quorum (Art. 109 (4) RPLV).¹⁸

Reflecting Germany's federal structure, the scope of people's legislation within a state is limited by the state's legislative competence. Furthermore, all state constitutions preclude people's legislation on financial affairs (cf. section 9 on page 22). Saarland's and Hesse's Constitutions preclude people-initiated legislation altering the constitution (on this, cf. section 5.1.5 on the next page).

¹⁷ Cf. tables 1–4.

¹⁸ On the effects of these quorums, cf. section 7 on page 20.

5.1.5. Constitutional Amendments as a Particular Case of People's Legislation

In principle, constitutional amendments follow the same procedure as the people's sub-constitutional legislation, although there are higher signature quorums in two Länder¹⁹, the requirement of a qualified majority in seven Länder²⁰, and higher approval and/or participation quorums in all Länder. The only state not allowing any constitutional amendment is Saarland (Art. 100 (4) SLLV). Another special case is Hesse, whose Constitution states in Art. 123 (2) that any constitutional amendment has to be approved by both the majority of the representatives and the majority of the voters. Since there is no specific provision of the constitutional amendment by means of people-initiated legislation, according to the prevailing doctrine, a people-initiated referendum amending the constitution is not admissible (Dreßler 2005: 138ff.; Jürgens and Rehmet 2009: 206).

¹⁹ Berlin and Bremen.

²⁰ Two-third majorities are required in Berlin, Brandenburg, Hamburg, Mecklenburg-West Pomerania, North Rhine-Westphalia, Saxony-Anhalt, and Schleswig-Holstein.

Table 5: Formal Requirements for Constitutional Referendums in Two-Tier-Models

| Land | admission phase | | petition phase | | referendum phase | |
|-----------------|--------------------|----------|-------------------|--------------------------|-------------------|-------------------|
| | signatures | period | signatures | period | appr. quorum | part. quorum |
| BW | 10 000 (0.10 %) | none | 16.7 % | 14 days | 50 % | none |
| BY ^a | 25 000 (0.30 %) | 2 years | 10 % | 14 days | 25 % | none |
| BE ^b | 50 000 (1.75 %) | none | 20 % | 4 months | 50 % ^c | none |
| HB ^d | 5 000 (1.00 %) | none | 20 % | 3 months | 50 % | none |
| HE ^e | – | – | – | – | – | – |
| NS | 25 000 (0.43 %) | 6 months | 10 % | 6–12 months ^f | 50 % | none |
| NW | 3 000 (0.02 %) | none | 8 % | 8 weeks | none | 50 % ^g |
| SL ^h | – | – | – | – | – | – |
| TH | 5 000 (0.24 %) | 6 weeks | 10 % ⁱ | 4 months | 40 % | none |

a Mandatory referendums for any constitutional amendments (cf. section 5.2 on page 17).

b Mandatory referendums for amendments to Art. 62 and 63 BELV (cf. section 5.2 on page 17).

c In addition, a two-thirds majority is required.

d Mandatory referendums for amendments to Art. 75, 143, 144, 145 (1), and 147 HBLV (cf. section 5.2 on page 17).

e Mandatory referendums for any constitutional amendments (cf. section 5.2 on page 17). However, Hesse's Constitution does not provide a people-initiated constitutional amendment.

f 6 months plus maximal 6 months, since the signatures of the application for admission are added.

g In addition, a two-thirds majority is required.

h Saarland's Constitution does not provide a people-initiated constitutional amendment.

i 8 % within 2 months if signatures are collected in office.

Table 6: Formal Requirements for Constitutional Referendums in Three-Tier-Models

| Land | initiative phase | | petition phase | | referendum phase | |
|------|--|--------|--------------------------------|----------|-------------------|--------------|
| | signatures | period | signatures | period | appr. quorum | part. quorum |
| BB | 20 000 ^a (0.78 %) ^b | 1 year | 80 000 (4 %) | 4 months | 50 % ^c | none |
| HH | 10 000 (0.82 %) | none | 5 % | 21 days | 50 % ^d | none |
| SH | 20 000 (0.93 %) | 1 year | 5 % | 6 months | 50 % ^e | none |
| SN | 40 000 (1.11 %) | none | 450 000 ^d (12 %) | 8 months | 50 % | none |

a Inhabitants.

b As percentage of inhabitants.

c In addition, a two-thirds majority is required.

d In addition, a two-thirds majority is required.

e In addition, a two-thirds majority is required.

f Art. 72 (2) SNLV requires a minimum of 450 000 signatures yet no more than 15 % of those entitled to vote.

Table 7: Formal Requirements for Constitutional Referendums in Hybrid Models (Two-Tier-Variant)

| Land | initiative phase | | petition phase | | referendum phase | |
|-----------------|--------------------|--------|--------------------|----------|-------------------|--------------|
| | signatures | period | signatures | period | appr. quorum | part. quorum |
| MV ^a | – | – | 120 000 (8.5 %) | none | 50 % ^b | none |
| RP | 20 000 (0.66 %) | 1 year | 300 000 (10 %) | 2 months | 50 % | none |
| ST | 8 000 (0.46 %) | none | 11 % | 6 months | 50 % ^c | none |

a Following the two-tier-variant, the step of application of admission for a referendum is omitted.

b In addition, a two-thirds majority is required.

c In addition, a two-thirds majority is required.

Table 8: Formal Requirements for Constitutional Referendums in Hybrid Models (Three-Tier-Variant)

| Land | initiative phase | | petition phase | | referendum phase | |
|------|--------------------|--------|--------------------|-------------------|-------------------|--------------|
| | signatures | period | signatures | period | appr. quorum | part. quorum |
| MV | 15 000 (1.06 %) | none | 120 000 (8.5 %) | none ^a | 50 % ^b | none |
| RP | 30 000 (0.99 %) | 1 year | 300 000 (10 %) | 2 months | 50 % | none |
| ST | 30 000 (1.73 %) | none | 11 % | 6 months | 50 % ^c | none |

a Upon request the signatures may be collected in office within 2 months.

b In addition, a two-thirds majority is required.

c In addition, a two-thirds majority is required.

5.1.6. Assessment of People's Legislation Procedures

Since World War II, some 200 initiatives/applications for admission were started (Jürgens and Rehmet 2009: 209). However, more than two-thirds of these initiatives failed – either they could not secure the signatures required or they were declared inadmissible – before a referendum was being held. Some 17 % were completely endorsed by the parliament thereby rendering the referendum obsolete, 8 % gained partial success (i. e. ended up in a compromise), another 8 % finally made it to the referendum phase. 4 % were successful, 1.6 % gained a partial success (i. e. a counter-proposal was successful) the remaining 2 % secured a majority of voters but failed to overcome the approval/participation quorum or the majority requirement (Jürgens and Rehmet 2009: 213ff.). Combining the full and partial successes in the parliamentary process and in the referendums, the victory rate sums up to approx. 25 %.

5.2. Mandatory Referendums

In some Länder mandatory referendums are required for (certain) constitutional amendments: In Bavaria (Art. 75 (2) BYLV) and Hesse (Art. 123 (2) HELV) mandatory referendums are required for any constitutional amendments. In Berlin, Art. 100 BELV requires a mandatory referendum to be held if an amendment to the constitution concerns the direct democratic institutions provided in Art. 62 and 63 BELV. In Brandenburg, a mandatory referendum has to be held on the election of a constituent assembly and on the adoption of a new constitution (Art. 115 BBLV). Bremen's Art. 125 HBLV requires a mandatory referendum to be held if Art. 75, 143, 144, 145 (1) or 147 HBLV is to be amended.²¹

The experiences with mandatory referendums are somewhat limited, since only 19 were held between 1946 and 2007. With the single exception of 1995 (in Hesse), all mandatory referendums were successful.

²¹ However, the referendum may be avoided if an amendment to one of these articles is adopted by unanimity in parliament (Art. 70 (a) HBLV).

5.3. Other Forms of Direct Participation

5.3.1. Popular Petition

The state constitutions of Berlin, Bremen, Hamburg, Lower Saxony, North Rhine-Westphalia, and Thuringia provide – besides the aforementioned institutions – a popular petition, an instrument which leads to a mandatory parliamentary debate.²² Since it is not followed by a referendum, however, the parliament has the final say. Here, too, there is a multitude of nomenclature: In Bremen and Thuringia it is called Bürgerantrag (citizens' application); it is called Volksinitiative – not to be confused with the Volksinitiative as an institution of the three-tier-model – in Berlin, Lower Saxony, and North Rhine-Westphalia; only in Hamburg it is actually called Volkspetition (popular petition). To date, only 42 popular petitions were filed, which might reflect the relatively high signature quorums (up to 50 000 signatures (2.55 % of those entitled to vote) in Thuringia (Art. 68 (3) THLV)) in relation to its uncertain effect.

5.3.2. Dissolution of Parliament before the Expiry of a Legislative Term

Although there is no scholarly consensus whether or not a people-initiated dissolution of parliament is to be considered as a direct democratic institution²³, for the sake of completeness, its procedures shall briefly be outlined.

The state parliaments of Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, and Rhineland-Palatinate may be dissolved by the people. In Baden-Württemberg, the petition for a referendum on the dissolution of parliament requires the signatures of one-sixth of those entitled to vote; the referendum is successful if it is supported by more than 50 % of those entitled to vote (Art. 43 (2) BWLV). The Bavarian Landtag may be dissolved if the referendum – initiated on request of one million entitled voters (approx.

²² The same applies to the popular initiatives which do not provide a drafted bill in Mecklenburg-West Pomerania, Rhineland-Palatinate, and Saxony-Anhalt.

²³ Some argue that being the counterpart of elections – which undoubtedly are part of representative, indirect democracy – the people-initiated dissolution of parliament is an instrument of representative democracy, too. However, since the dissolution of parliament is often linked to the desire to change not only the representatives but also the policy they pursue, one could consider the dissolution of parliament as a means of direct democracy. For a detailed discussion on the dual nature of the people-initiated dissolution of parliament, see Neumann 2009: 235.

10 %) – is successful (Art. 18 (3) BYLV). In Berlin, a referendum aimed at the dissolution of parliament before the expiry of a legislative term requires the signatures of at least 50 000 people entitled to vote as proof of support; the referendum must be held if at least one-fifth of the people entitled to vote agree to the petition within four months. The referendum shall become effective only if at least half of those entitled to vote cast their votes, with a majority in favor of early termination. In Brandenburg²⁴ and Bremen, the procedure of people-initiated dissolution of parliament follows the scheme of a people-initiated constitutional amendment. In Rhineland-Palatinate, the dissolution of parliament follows the procedure and quorums of the two-tier variant of the hybrid model (Art. 109 (1) RPLV; § 61ff. RPLWahlG).

North Rhine-Westphalia provides for an indirect involvement of the people: If a law initiated by the government is rejected by the parliament, the government may ask for a referendum. If the required quorum is obtained, the law passes and the government has the option to dissolve the parliament.²⁵ However, in case of being rejected by the people, the government has to step down. Hence the submission for referendum is linked with a call for a vote of confidence, which is a “creative way out of a political crisis between government and parliament”, as Böckenförde (2006: 125) puts it.

The effect of the institution of the dissolution of parliament remains relatively small and occurred only twice: In 1971, the “Liga für eine demokratische Verwaltungsreform in Baden-Württemberg e. V.” initiated successfully a petition to dissolve the parliament in order to stop an administrative reform. Although more than 54 % of the voters voted in favor of the dissolution, it failed to overcome the 50 %-participation threshold (Wehling 2005: 16). In 1981, a petition for dissolution of parliament in (West) Berlin was more successful. However, the parliament forestalled the referendum by dissolving itself before the referendum was being held (Posselt 2005: 68).

²⁴ The higher requirement of 150 000 signatures to initiate a petition for a referendum on the dissolution of parliament being the only difference.

²⁵ Art. 35 (2) in conjunction with Art. 68 (3) NWLV requires a majority of voters and a participation quorum of 15 %.

6. Direct Democratic Elements on the Municipal Level

Although the direct democratic elements on the municipal level will not be discussed in detail, it should be noted that all municipalities provide – at least some – institutions that allow direct participation of the citizens or residents, respectively.²⁶ The most common forms are the petition for a citizens' referendum and the citizens' referendum (equivalent to petition for a referendum on the Länder level and referendum, respectively). As on the Länder level, on the municipal level, too, there are many restrictions. Given the small degree of self-determination – in particular to the Swiss counterparts – the most far-reaching restriction is that any petition for a citizens' referendum has to be within the municipality's jurisdiction and its remit. As on the Länder level, all municipalities provide some thematic restrictions, e. g. the financial taboo. Moreover, Rhineland-Palatinate provides a catalog of issues which are *not* precluded (Geitmann 2002: 167).

IV. Criticism on the Current State of Direct Democracy in Germany

The various restrictions of direct democracy and the many shortcomings in procedure have met with considerable opposition, therefore, the following sections outline the most important points of criticism on the current state of direct democracy in Germany.

7. Prohibitive Effect of Signature and Approval/Participation Quorums

It is undisputed that every means of direct democracy must be tested on its social relevance. A feasible way to ensure the social relevance is to establish a threshold, e. g. a certain number of signatures that have to be collected

²⁶ Direct democratic institutions on the municipal level are discussed in more detail in Geitmann 2002; Schiller 2007; Mittendorf 2009; Kost 2010.

before an initiative materializes. What is much more crucial, however, is the height of those institutional hurdles. If the threshold is too high, little to no initiatives will be started hence turning provisions of direct democracy into empty promises. If the threshold is too low, however, this might enable even the most marginal initiatives to materialize, what might cause the collapse of a political system (Neumann 2009: 813). Eder et al. (2009) tested whether or not higher signature requirements (and shorter time limits) had an influence on relative initiative frequency in the German Länder. Their results support previous findings of similar studies on the U. S. states (Magelby 1994) which found that higher institutional requirements correspond to lower annual numbers of initiatives.

The intention of approval or participation quorums in the third stage of a referendum is twofold: On the one hand, the quorums should secure a high legitimacy of the adopted act; on the other hand, the quorums should prevent the tyranny of well organized, financially potent minorities (Hüller 2006: 829). However, high quorums – such as the 50 %-approval quorums Saarland and Hesse for sub-constitutional referendums, in Baden-Württemberg, Berlin, Brandenburg, Bremen, Hamburg, Lower Saxony, Mecklenburg-West Pomerania, Rhineland-Palatinate, Saxony, Saxony-Anhalt and Schleswig-Holstein in constitutional referendums – set up virtually insuperable hurdles.²⁷ Thus, the quorums required in today's state constitutions provide the very same incentives to abstain from voting as did the quorums required in Art. 75 WRV. These incentives, in turn, foster the intransigence of the political elite and thereby undermine on key contribution of direct democracy – the political discourse. Moreover, quorums make impossible the non-participation in the political process, since every non-voter supports the opponents by decreasing the chances of success of a referendum (Jung 1999: 881).

²⁷ This is demonstrated by the following fictitious example: A referendum with a (high) participation rate of 60 % – which is equivalent to average voter turnout for Landtag elections since 2005 – would require an approval rate of 83 % to pass the 50 %-approval quorum.

8. The Requirement of a “Reasoned and Detailed Draft Bill”

Besides the signature quorums required for initiation of either a popular initiative or a petition for a referendum, the criteria of a “reasoned and detailed draft bill” is another formal criteria of admissibility. The narrow interpretation of this provision by the State Constitutional Courts of Bremen²⁸ and Saarland²⁹ was heavily criticized, since one could not expect a sufficient determination from laymen (Wiegand 2006: 443ff.).³⁰ This criticism led to a change: Most constitutions nowadays grant the right to revise a draft bill (e.g. Art. 50 (2) HHLV).

9. The Financial Taboo

A distinct feature of German direct democracy is the more or less comprehensive exclusion of budget-affecting financial matters. These provisions trace back to Art. 73 (4) WRV which excluded budget, taxation laws, and pay regulations from people-initiated referendums (Krafczyk 2005: 46ff.; Wittreck 2009). This catalog may be complemented by restrictions affecting fees levied by municipal corporations (e.g. Art. 62 (2) BELV). The intention of these provisions is to protect the budgetary prerogative of the parliament, since this prerogative – being part of the system of checks and balances – is one of the key functions of the parliament (Krafczyk 2005: 81ff., 155ff.). However, since virtually any (draft) law has financial implications – and a strict interpretation of this financial taboo would stop almost all petitions – the provisions of the financial taboo are also in danger to exert a prohibitive effect (Krafczyk 2005: 69). Nonetheless, the Saarland State Constitutional Court³¹ followed this strict interpretation of the financial taboo by declaring any people-initiated draft law having financial implications – be they positive or negative – as inadmissible under Art. 99 (3) SLLV.³² Other state constitutional courts took a slightly more permissive position and defined

28 See decision of HBStGH of June 9, 1986.

29 See decision of SLVerfGH of July 14, 1987.

30 For a detailed discussion, see Przygode 1995.

31 See judgment of SLVerfGH of January 23, 2006.

32 However, due to the *sui generis* formulation of the financial taboo in Art. 99 (3) SLLV (“Über finanzwirksame Gesetze [...] finden Volksbegehren nicht statt.”), this position remained singular in the jurisprudence of the State Constitutional Courts.

thresholds – ranging from 0.06 %³³ to 0.7 %³⁴ of the state's overall budget – below which referendums were deemed admissible under the provision of the financial taboo (Neumann 2009: 399). The recent judgment of the State Constitutional Court of Saxony³⁵, however, has to be mentioned as a laudable exception: In its potentially groundbreaking ruling it favored a generous interpretation of the financial taboo and declared a petition for a referendum admissible "as long as it allows the parliament to balance the budget" (Neumann 2009: 403).

10. The Potential Misuse of Counter-Proposals

Counter-proposals – i. e. parliamentary proposals addressing the concern raised in the petition for a referendum but dealing with the matter in a different way from that proposed by the authors of the petition of a referendum – are provided in a vast majority of State Constitutions (Bremen and North Rhine-Westphalia being the only exceptions).³⁶ The counter-proposal should not only work as a corrective to the direct democratic institutions by strengthening the role of the parliaments but it should also ease the negotiation process to find a compromise and it should further facilitate the expression of the voter's will (Lombardi et al. 2008). Yet, where the voter is allowed to support only a single proposal, the counter-proposal is in danger to be misused as a means of splitting of votes (Wiegand 2006: 460ff.). In combination with high approval quorums counter-proposals decrease significantly the chances of success of a referendum. Therefore, some Länder (e. g. Lower Saxony, Rhineland-Palatinate, and Saxony-Anhalt) provide the possibility of multiple yes-votes. This solution, however, raises another problem, since it might occur that several contradicting proposals may secure sufficient support in a referendum. To avoid indifference in case of a double (or multiple) yes-vote, Art. 76 (4) BYLWG provides for a "deciding question" (Stichfrage): Following the Swiss model in Art. 139b BV, the voters may vote in favor of several proposals and they may indicate the proposal they

³³ See decision of BYVerfGH of December 15, 1976.

³⁴ See decision of BVerfGH of July 3, 2000.

³⁵ See judgment of SNVerfGH of July 11, 2002; for an appraisal, see Jung 2003.

³⁶ The very same institution is acknowledged by the Swiss Constitution in its Art. 139 (5) and 139b.

prefer if two or more are accepted which enables the expression of every configuration of preferences (Albrecht 2003: 227).

V. Conclusion

In this last section, some suggestions are presented on how to improve German direct democracy.

One of the main goals of this paper was to present an overview of the various direct democratic institutions provided in the constitutions of the Länder. The main reason for this being necessary is the Babylonian confusion in terminology and procedures. Therefore, Neumann (2009: 805ff.) is quite right to demand a terminological harmonization, since only sufficiently clear provisions enable laymen to make use of their political rights.³⁷

As Rux (2008: 909ff.) and Neumann (2009: 812ff.) argue, the implementation of the three-tier-model of people's legislation in all Länder would be desirable. The three-tier-model allows a parliamentary debate at an early stage, thereby maximizing the referendum's agenda-setting-power, which is why this model serves best as a means of communication between the "common people" and the governing elite.

For the same reason, signature quorums required in the first (initiative phase) and in the second (petition phase) stage of a sub-constitutional referendum should be lowered significantly – Rux (2008: 912ff.) suggests a signature quorum of 1 % within a "generous" time limit for the initiative phase and 5 %-quorum within three to four months for the second phase; in Neumann's opinion, for the first phase a 1 %-quorum and a 5 %-quorum without any time limit for the second phase seems adequate (Neumann 2009: 813ff.). In consideration of the issues raised in section 7, any quorums in the third phase should be abolished – a view supported by Przygode (1995: 473ff.). Given the importance of the constitution as a legal basis, Neumann (2009: 815) – supporting the abolition of quorums for sub-constitutional referendums – insists on higher requirements for constitutional amendments: He suggests

³⁷ For the same reason Neumann (2009: 808ff.) further makes a strong point on unification and simplification of the state constitutions: Institutions of direct democracy should be integrated into the constitutions according to their respective legal nature (e. g. provisions on the popular petition should be integrated to the section addressing basic rights; instruments leading to the dissolution of parliament should be part of the section on the parliament; instruments of people's legislation should be integrated to the section on legislation etc.).

a signature quorum of 2 % for the first phase of a constitutional referendum and a 10 %-quorum in the second phase. For the third phase, he suggests – with reference to the solution proposed by Jung (1999: 893ff.) – the requirement of a two-thirds majority of those voting, thereby satisfying the demand for a higher legitimacy without the perverse incentives approval and participation quorums provide.

The financial taboo has to be abolished. Since virtually any law has financial implications – correctly observed by Neumann (2009: 821ff.) –, state governments are tempted to challenge the constitutionality of a certain draft law only to burden its proponents with a legal proceeding; the resulting delay and the funds required might be enough to stop the endeavor entirely. Moreover, the courts should not be burdened to decide a question which is less a legal but essentially a political one.

In agreement with Neumann (2009: 815), the preservation (or the introduction, respectively) of the parliament's right to submit a counter-proposal is supported. However, the danger of misuse as a means of splitting of votes must be eliminated through the introduction of the Bavarian system providing for double (or multiple) yes-votes combined with a deciding question.

VI. References

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